NO. 70-244

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

ROGER BOSHES, et al.,

Petitioners,

v.

GENERAL MOTORS CORPORATION and the HONORABLE WILLIAM J. CAMPBELL, Judge of the United States District Court for the Northern District of Illinois,

Respondents.

On Petition for A Writ of Certiorari To the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT GENERAL MOTORS CORPORATION IN OPPOSITION

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BRIEF FOR RESPONDENT GENERAL MOTORS CORPORATION IN OPPOSITION

OPINIONS BELOW

No opinions were rendered by the Court of Appeals or by the District Court for the Northern District of Illinois.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether this Court should exercise its certiorari jurisdiction to review the constitutionality of a local civil rule for the prevention of abuse of class actions

a) when the District Court deferred consideration of a motion attacking the rule until a previously filed defense motion challenging the legal sufficiency of the complaint was decided,

b) when the merits of petitioners' attack on the rule were not reached either by the District Court or by the Court of Appeals, and

c) when the rule in question has since been amended by the judges of the District Court?

2. Whether this Court should exercise its certiorari jurisdiction to review the District Court's decision which simply deferred the class action determination under Rule 23 of the Federal Rules of Civil Procedure until a previously filed motion challenging the legal sufficiency of the complaint was decided?

STATEMENT OF THE CASE

On August 6, 1968, five passenger car owners, petitioners here, filed a class action on behalf of all persons in the United States who had purchased General Motors Corporation passenger cars in the preceding four years. They sought to recover treble damages on the theory that defendant General Motors, respondent here, had violated the antitrust laws by, among other things, allegedly "conspiring" with itself or with or among its internal passenger car divisions in establishing the prices for new General Motors passenger cars. The theory of the complaint appeared to have been guided by the decision in *Hawaiian Oke & Liquors, Ltd.* v. *Joseph E. Seagram & Sons, Inc.*, 272 F. Supp. 915 (D. Hawaii 1967), which was subsequently

reversed, 416 F.2d 71 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970).

General Motors filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted, and the final memorandum of the parties briefing that motion was filed on August 14, 1970.

On September 28, 1970, while the motion to dismiss was under submission, petitioners filed two procedural motions. In the first, they asked that Rule 22 of the Civil Rules for the Northern District of Illinois be modified or held unconstitutional. (Pet. App. at 1a).* Rule 22 provided that in class actions brought under Rule 23 of the Federal Rules of Civil Procedure no communication concerning the action shall be made by any of the parties or by their counsel with any potential or actual class member who is not a formal party to the action, until such time as an order may be entered approving the communication. (Pet. at 3, n. 1). Petitioners stated in their motion that they wanted to be free to communicate with various State attorneys general concerning the action without court supervision. (Pet. App. at 2a).

In their second motion, petitioners asked the District Court to consider, ahead of all other matters, the class action issues under Rule 23 of the Federal Rules of Civil Procedure. (Pet. App. at 7a).

On October 6, 1970, the District Court denied petitioners' motions with leave to reinstate, explaining that it had not yet ruled on the pending motion to dismiss the complaint:

> "I think I would rather finish what I am doing now. Your motion is denied. [sic] I will rule on what is pending before me now, which was fully submitted.

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*"Pet. App." refers to petitioners' separately printed appendix; "Res. App." refers to the appendix to respondent's opposition.

> Following that, you have leave to reinstate your motion[s], if it appears appropriate." (Tr. at 3-4, Oct. 6, 1970; Res. App. at 14).

Petitioners filed two appeals from this ruling on November 4, 1970. (Pet. App. at 8a, 10a).

On December 11, 1970, the District Court granted respondent's motion to dismiss the complaint insofar as it purported to state a claim based on Section 1 of the Sherman Act and on the so-called intra-corporate conspiracy theory. (Pet. App. at 16a). In granting the motion to dismiss, the District Court also announced:

> "The motions seeking a determination that this is a proper class action brought pursuant to Rule 23 and other questions under Rule 23 and Local Rule 22 will be considered if and when the court concludes that plaintiffs' complaint states a claim upon which relief can be granted." (Order, Dec. 11, 1970; Pet. App. at 17a).

Although the District Court had dismissed the complaint insofar as it was based on the intra-corporate conspiracy theory, other substantive allegations remained because on August 27, 1970, while the original motion to dismiss was under submission, petitioners filed an amendment to their complaint setting forth new matters.*

On January 4, 1971, General Motors moved the Court of Appeals to dismiss petitioners' appeals from the October 6th order. (Pet. App. at 11a). It argued that the order was interlocutory and therefore not appealable because the District Court had not passed on the merits of petitioners'

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*General Motors subsequently filed a motion to dismiss the amended complaint; that motion was denied on July 8, 1971, and on July 28, 1971, General Motors filed its answer denying the substantive allegations of the amended complaint.

motions, but had simply deferred consideration of them until the sufficiency of the complaint, then under consideration, had been determined. (*Ibid.*) On February 5, 1971, while the motion to dismiss the appeals was under submission, petitioners filed a petition for writs of mandamus and prohibition, seeking to bar enforcement of Local Civil Rule 22. (Pet. App. at 40a). On February 11, 1971, petitioners filed another petition for writs of mandamus and prohibition, which sought to require the District Court to make the Rule 23 class action determination. (Pet. App. at 52a). The Court of Appeals dismissed the appeals and denied the petition respecting Local Civil Rule 22 on February 12, 1971, and it denied the petition respecting Federal Civil Rule 23 on February 26, 1971. (Pet. App. at 37a, 49a, and 61a, respectively).*

On June 15, 1971, the judges of the Northern District of Illinois amended Local Civil Rule 22 by adopting the rule for the prevention of abuse of class actions that was recommended by the Judicial Panel on Multidistrict Litigation subsequent to the adoption of original Rule 22. (Res. App. at 22).

ARGUMENT

I.

THERE IS NO REAL ISSUE FOR THIS COURT TO REVIEW.

The District Court clearly did not reach the merits of petitioners' motion respecting Local Civil Rule 22 or their motion respecting Federal Civil Rule 23. The Court simply deferred considering these motions until a previously filed

*Rehearing was denied on March 10, 1971, as to the appeals, on March 16, 1971, as to the Federal Civil Rule 23 petition, and on April 8, 1971, as to the Local Civil Rule 22 petition. (Pet. App. at 39a, 63a, & 51a, respectively).

motion (which had been briefed and was under consideration) challenging the legal sufficiency of the complaint was disposed of, and it expressly granted petitioners leave to resubmit their motions at an appropriate time. (Pet. App. at 17a; Res. App. at 14). This ruling did not involve any determination of substantive matters. It was an exercise of sound discretion in the interest of judicial economy, since dismissal of the complaint would have obviated the necessity for any class action determination and the need for any class communications.

Rulings of this kind are manifestly not final decisions suitable for review by way of certiorari. In *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916), this Court explained its denial of a petition for a writ of certiorari as follows:

> "The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application...."

See also *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970). In *Appalachian Power Co.* v. *American Institute of Certified Public Accountants*, 80 S. Ct. 16, 4 L. Ed.2d 30 (1959), Mr. Justice Brennan denied a stay of the mandate of the Court of Appeals pending disposition of a petition for certiorari on the ground that none of the questions presented had the prospect of commanding four votes for review, stating:

> "ordinarily an application by a District Court of the Rules of Civil Procedure where affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts."

Certiorari was subsequently denied. 361 U.S. 887 (1959).

The issues that petitioners seek to have reviewed here were not even ripe for decision by the Court of Appeals. That Court presumably dismissed petitioners' appeals because the order appealed from was not a final order and hence not appealable, the only ground for dismissal urged by respondent. (Pet. App. at 11a). Dismissal by the Court of Appeals was clearly mandated by the teaching of such decisions as *Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966), which hold that pretrial orders "that in no way touch on the merits of [a] claim but only relate to pretrial procedures" are not appealable.

II.

THE AMENDMENT OF LOCAL CIVIL RULE 22 MAY HAVE MOOTED THE CONSTITUTIONAL ISSUE THAT PETITIONERS WOULD RAISE.

On June 15, 1971, the judges of the Northern District of Illinois amended Local Civil Rule 22 to conform to a comparable rule recommended by the Judicial Panel on Multidistrict Litigation. *Manual for Complex and Multidistrict Litigation* § 1.61. The amended rule differs from former Local Rule 22 in several respects and includes the following provision which was not present in the former rule:

> "This rule does not forbid . . . communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein." (Res. App. at 23).

Since petitioners' motion was made before Rule 22 was amended, their motion should, in any event, be resubmitted by them and considered by the District Court in the light of the new rule. See *Bryan* v. *Austin*, 354 U.S. 933 (1957).

Conversely, it would be inappropriate for this Court, without having the benefit of a decision on the merits by either lower court, to consider the constitutionality of a rule that has been revised. This Court "does not sit to satisfy a scholarly interest" in issues which may have become academic, particularly when they involve matters of constitutionality. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

III.

REVIEW OF LOCAL CIVIL RULE 22 BY THIS COURT IS INAPPROPRIATE FOR OTHER REASONS.

After Rule 23 of the Federal Rules of Civil Procedure was revised in 1966 to expand the availability of the class action device, a problem emerged that was not covered by the Rule itself. That problem was the abuse of class actions by improper solicitation of class members and by misrepresentation of the litigation in communications to them.* Following careful study, the Judicial Panel on Multidistrict Litigation reported in May, 1970, that:

> "The class action under Rule 23 is subject to abuse, intentional and inadvertent, unless procedures are devised and employed to anticipate abuse. Among the potential abuses of the class action processes are the following: (1) solicitation of direct legal representation of potential and actual class members who are not

*For example, in *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 281 F.Supp. 622, 625 (S.D. N.Y. 1968), it was discovered that, although the court had approved a notice to be sent to the class members, plaintiffs' counsel had enclosed with the notice an unauthorized letter of their own, which was held to be improper because of "inferences which might easily be drawn from it which do not reflect accurately the legal position of the members of the class."

formal parties to the class action; (2) solicitation of funds and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (3) solicitation by formal parties of requests by class members to opt out in class actions under subparagraph (b) (3) of Rule 23; and (4) unauthorized direct or indirect communications from counsel or a party, which may misrepresent the status, purposes and effects of the action and of Court orders therein, may confuse actual and potential class members, and create impressions which may reflect adversely on the Court or the administration of justice. To anticipate and prevent these abuses timely action should be taken by local rule or by orders in the particular civil action or by both." *Manual for Complex and Multidistrict Litigation* §*1.61.*

Even before the Judicial Panel's recommendations were published, District Courts had made tentative efforts to deal with the problems described. Mindful of the power, and the duty, of the trial court to regulate certain communications in order to protect the integrity of the judicial process, *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *Estes* v. *Texas,* 381 U.S. 532 (1965); *Cox* v. *Louisiana,* 379 U.S. 559 (1965), several District Courts had entered orders in particular cases prohibiting communications with actual or potential class members without approval of the court. See, *e.g., Siegel* v. *Chicken Delight, Inc.,* 271 F.Supp. 722 (N.D. Cal. 1967); *City of San Diego* v. *Rockwell Mfg. Co.,* No. C-50190-GHB and related cases (N.D. Cal. 1970). (Res. App. at 18). A local rule to that effect was adopted by the Northern District of Texas. (Misc. Order No. 688, Feb. 27, 1970). (Res. App. at 20). Petitioners' diligent research notwithstanding (Pet. at 17), Civil Rule 22 of the Northern District of Illinois was adopted in the light of these previous efforts. See also *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.,* 1970 Trade

Cas. ¶73,346 (E.D. Pa. 1970), at 89,387; Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 44 (1967).

IV.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW IN RESPECT TO RULE 23.

Petitioners would have this Court review an order which postponed the Rule 23 class determination until the legal sufficiency of the complaint (particularly the intra-corporate conspiracy issue) was determined without offering a solitary reason why such a routine procedural ruling should be reviewed by certiorari. Plainly, "the [District] Court under Rule 23 is given wide discretion to make class determinations at such times and under such circumstances as will best fit the needs of a particular case." *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 1970 Trade Cas. ¶73,346 (E.D. Pa. 1970), at 89,390. As the Court of Appeals for the Second Circuit has observed, issues of judicial administration involving Rule 23 "should not be decided in an abstract or academic manner but rather in a practical and realistic way by a trial judge who has knowledge of the actual problems presented. . . ." *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295, 298 (2d Cir. 1969).

Orders similar to the one at issue are not infrequently entered in class actions pending the determination of other issues. *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp., supra; Berland* v. *Mack*, 48 F.R.D. 121, 124 (S.D. N.Y. 1969). And they are clearly proper where the prior determination of other issues may simplify or even dispose of the litigation before resort to the complex mechanics of Rule 23 is required. See *Manual*

for Complex and Multidistrict Litigation §1.8. There is no basis for review by this Court of such a procedural ruling, based as it is on the particular facts of this particular case, having no implications beyond this case. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Rice* v. *Sioux City Memorial Cemetery, Inc.*, 349 U.S. 70, 79 (1955). Moreover, since the District Court has now denied respondent's motion to dismiss the amended complaint and respondent's answer has been filed, Rule 23 matters would seemingly be the next order of business for the District Court.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Boshes v. General Motors Corporation, Transcript of Proceedings in District Court, October 6, 1970.

THE CLERK: 68 C 1454, Boshes versus General Motors. Motion for orders under Rule 23 and Rule 22.

Same case, same title, motion of plaintiff to file amendment number one to the complaint and for an order on defendant to file a responsive pleading.

THE COURT: All right, who wants to say something?

MR. CHAFFETZ: Would you rather go first?

MR. SUEKOFF: If the Court please, we have our motion for leave to file our amendment to the complaint. We also have our motion this morning for alternative orders with respect to Rule 22.

THE COURT: Well, I think I have enough before me now to rule on the matter that is now pending, but do you agree to the filing of the amended complaint?

MR. CHAFFETZ: Yes, your Honor. Our suggestion is that your Honor proceed to rule on the matters now before you, that you accept the amendment and treat that as a separate matter and give us 45 days in which to—

THE COURT: I am half-way through the memorandum of what is now before me. Now do I have to stop and start all over again, is that what you want?

MR. CHAFFETZ: We think not. May I spell that out? This amendment, while it purports to be a physical amendment of the original complaint, added paragraph 24-A which is an entirely independent and separate matter from the subject matter of the complaint.

THE COURT: But you have no objection to their filing it?

MR. CHAFFETZ: No objection to their filing it, and all we ask is that we have 45 days to investigate and possibly at the end of that time file a separate motion to dismiss.

THE COURT: We will give leave, then, to file amendment number one as you designate it here, to the complaint and 45 days to answer or otherwise plead.

Now, then, as to these successive alternative orders to treat Civil Rule 22—what are you talking about? What is it you want? I think the matter is fully briefed and I'm half-way through it. Now, what do you want to do, start all over again?

MR. SUEKOFF: No, your Honor. While this is pending and before there is any decision one way or the other, we would like to be able to contact the representatives of our class, the State Attorneys General—

THE COURT: I think I would rather finish what I am doing now. Your motion is denied. I will rule on what is pending before me now, which was fully submitted. Following that, you have leave to reinstate your motion, if it appears appropriate.

(Which were all the proceedings had in the above-entitled cause.)

City of San Diego v. Rockwell Mfg. Co., No. C-50190-GHB and related cases (N.D. Cal.), Pre-trial Order No. 1

IN THE

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF CALIFORNIA

CITY OF SAN DIEGO, *Plaintiff,* v. ROCKWELL MANUFACTURING COMPANY, et al., *Defendants.*	No. C-50190-GHB and related cases Nos. C-50191-GHB, C-50192-GHB, C-50249-GHB, C-50284-GHB, C-50339-GHB, C-50613-GHB, C-50947-GHB, C-50949-GHB, C-51131-GHB, C-51526-GHB, C-51741-GHB, C-52338-GHB, C-69170-GHB, C-69172-GHB, C-69173-GHB, C-69191-GHB, C-69227-GHB, C-69453-GHB and C-69570-GHB

PRE-TRIAL ORDER NO. 1

A preliminary pre-trial conference having been held in the above actions on January 7, 1970, at which all parties were represented by counsel,

IT IS ORDERED severally in each of the above actions that:

1. This order bears the titles or court file numbers of the above actions solely as a matter of convenience of court and counsel and does not constitute in any way a consolidation of any of those actions with any other of those actions for any purpose. A list of such actions is attached hereto as Appendix A.

2. A duplicate of this order shall be filed in each of the above actions, shall have the same effect as an original

hereof and shall apply only to the actions in which it is filed.

3. Reference herein to "plaintiffs" is solely to the plaintiffs named in each particular action in which a duplicate of this order shall be filed, and reference herein to "defendants" is solely to the defendants named in the complaint in each of such actions.

4. It is ordered that the general obligations of the parties with respect to the conduct of the proceedings as set out at pages 4 through 10 of the transcript dated January 7, 1970, are hereby incorporated by reference herein.

5. Maxwell M. Blecher and William H. Orrick, Jr., are hereby appointed liaison counsel for plaintiffs and defendants, respectively.

6. All discovery or other pretrial proceedings in the above actions are stayed, except as hereinafter provided, subject to further order of Court.

7. A further pre-trial conference in the above actions shall be held at 9:30 A.M. on February 26, 1970, at the United States Court House, 450 Golden Gate Avenue, San Francisco, California.

8. The first wave interrogatories propounded by defendants in action No. 50190 and certain other actions shall be deemed to have been served upon plaintiffs in all of the above actions. Plaintiffs which have not heretofore filed objections to those interrogatories shall have until January 30, 1970, within which to file such objections as they may have. A hearing on all objections to said interrogatories shall be held on February 26, 1970. Plaintiffs shall file their interrogatory answers on or before April 3, 1970.

9. On or before January 30, 1970, or such other date as may be agreed upon among the parties, all plaintiffs

in actions Nos. 50190, 50191, 50192, 50249, 50284, 50339, 50613, 50947, 50949 and 51131 shall complete their production of the following documents:

> All records, memoranda, correspondence and other documents and papers relating to the purchase of water meters or parts therefor by plaintiff for the period commencing January 1, 1960, to date, including without limitation all specifications, invitations for bids or quotes, bids, quotes, awards and papers relating to the same.

10. On or before April 3, 1970, or such other date as may be agreed upon between the parties, plaintiffs in all of the above actions other than the actions enumerated in paragraph 9 hereof shall produce their documents of the sort described in said paragraph 9; provided, however, that said plaintiffs may have until January 30, 1970, to file any objections they may have to the production of such documents, and a hearing shall be held on any such objections on February 26, 1970.

11. Defendants' application to the Court for leave to take depositions of representatives of plaintiffs shall be heard on February 26, 1970.

12. The Motion to Produce heretofore filed by plaintiffs in action No. 50190, and others, shall be deemed to have been served upon all defendants in all of the above actions, provided, however, that plaintiffs may have until January 23, 1970, in which to file such additions, amendments or corrections to said motion (and supporting documents) as may be desired, and that defendants shall have to and including February 20, 1970, in which to file any memorandum in response to any such proposed additions, amendments or corrections. A hearing on said motion shall be held on February 26, 1970.

13. By January 23, 1970, plaintiffs shall file first wave interrogatories. Defendants shall have to February 20, 1970, in which to file objections to said interrogatories. A hearing shall be held on such objections on February 26, 1970. Defendants shall file their interrogatory answers on or before April 3, 1970.

14. The motions for summary judgment filed by defendant Rockwell in actions Nos. 50190, 50191, 50192, 50284 and 50949 shall be heard on February 26, 1970.

15. The procedure for resolving the issue of whether actions Nos. 50284, 69170 and 69191 may be maintained as class actions in the form in which filed shall be considered by the Court on February 26, 1970. On or before January 30, 1970, plaintiffs in said actions shall file memoranda addressed to this subject, and defendants shall file any memoranda responsive thereto on or before February 23, 1970.

16. Counsel for plaintiffs in cases transferred from other districts for consolidated pre-trial proceedings, pursuant to 28 USCA § 1407, are admitted to practice in this Court for the purpose of those proceedings. Papers filed by counsel in such transferred cases need not comply with Local Rule 10 requiring papers filed to have numbered lines.

17. In all cases in the Water Meter litigation wherein class action is sought or approved, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and pro-

posed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b) (3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

Dated: January 30, 1970.

/s/ GEORGE H. BOLDT
United States District Judge

Local Rule for Prevention of Potential Abuse of Class Action, Misc. No. 688 (N.D. Tex.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

LOCAL RULE

FOR PREVENTION OF POTENTIAL ABUSE OF CLASS ACTION

In every potential and actual class action under Rule 23, F.R.Civ.P., all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent of and approval of the communication by order of the Court. Any such proposed communication shall be presented to the Court in writing, with a designation of or description of all addressees and with a motion and proposed order for prior approval by the Court of the proposed communication and proposed addressees. The communications forbidden by this rule include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses, from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b) (3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential Court orders therein, which may create impressions tending, without cause, to reflect adversely on any

party, any counsel, the Court, or the administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action.

/s/ JOE E. ESTES
Chief Judge, United States District Court

/s/ SARAH T. HUGHES
United States District Judge

/s/ LEO BREWSTER
United States District Judge

/s/ W. M. TAYLOR, JR.
United States District Judge

/s/ HALBERT O. WOODWARD
United States District Judge

Rules of the District Court for the Northern District of Illinois, Civil Rule 22 (as amended June 15, 1971)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

In accordance with the unanimous action of all of the Judges of this Court in executive session on June 15, 1971, this Court finds that class actions under Rule 23, Federal Rules of Civil Procedure, are subject to abuse, intentional and inadvertent, unless procedures are devised and employed to anticipate abuse. Among the potential abuses of the class action processes are the following: (1) solicitation of direct legal representation of potential and actual class members who are not formal parties to the class action; (2) solicitation of funds and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (3) solicitation by formal parties of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23; and (4) unauthorized direct or indirect communications from counsel or a party, which may misrepresent the status, purposes and effects of the action and of Court orders therein, may confuse actual and potential class members, and create impressions which may reflect adversely on the Court or the administration of justice. To anticipate and prevent these abuses, this Court unanimously adopts the following order.

ORDER

IT IS HEREBY ORDERED that Rule 22 of the Civil Rules of this Court be, and the same is hereby amended to read as follows:

RULE 22. For Prevention of Potential Abuse of Class Actions.

In every potential and actual class action under Rule 23, F.R.Civ.P., all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without consent of and approval of the communication by order of the Court. Any such proposed communication shall be presented to the Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by the Court of the proposed communication and proposed addressees. The communications forbidden by this rule, include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses, from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential Court orders therein, which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or the administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule.

This rule does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney

General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

ENTER:

FOR THE COURT

EDWIN K. ROBSON
Chief Judge

June 15, 1971

MOTION FILED

AUG 5 1971

IN THE

Supreme Court of the United States

No. 70-244

ROGER BOSHES, ESTHER K. ROERIG, CURTIS COLLUM, FRANK JACKSON and JAMES TAYLOR,

Petitioners,

v.

GENERAL MOTORS CORPORATION and the HONORABLE WILLIAM J. CAMPBELL, Judge of the United States District Court for the Northern District of Illinois,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF CONSUMERS UNION OF U.S. INC., FEDERATION OF HOMEMAKERS, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AMERICAN CIVIL LIBERTIES UNION AND RALPH NADER AS AMICI CURIAE

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It is hereby respectfully moved pursuant to Rule 42 of the Rules of this Court that the above named amici curiae be granted leave to file the accompanying brief in support of the petition for a writ of certiorari.

Consent to such filing has been requested and has been granted on behalf of petitioners, but denied on behalf of respondent, General Motors. Our letter to Judge Campbell, as a nominal respondent, has not been answered.

The interest of amici curiae as stated in the accompanying memorandum is as follows:

Consumers Union of U.S. Inc. is a nonprofit membership organization with nearly 2,000,000 members whose purpose is to provide information and counsel to consumers about the management of family expenditures, including information relating to legislative, judicial and regulatory actions of government affecting consumer welfare. Consumers Union accepts no support from any commercial organization. Federation of Homemakers is a nationwide membership organization of consumers, with some 6,000 active members, particularly interested in food and drug matters, which participates in administrative, judicial and legislative proceedings on behalf of consumers. The American Civil Liberties Union is a non-partisan and nonprofit corporation whose purpose is defending and advancing civil liberties through litigation and public education. The National Legal Aid and Defender Association is a membership organization to which nearly all the public defender, legal aid and legal services projects throughout this country belong. NLADA is devoted to providing effective legal assistance, civil and criminal, to poor persons. Ralph Nader in his individual capacity, and through associated nonprofit organizations which he has founded, has for many years been devoted to the goal of making private corporations and the instruments of government more responsive to the needs of consumers and the public generally.

Amici curiae have in common the public interest objective of developing methods to protect individuals, as consumers and otherwise, against abuses incident to the exercise of concentrated economic power. To that end the class action, particularly as expanded and improved by the 1966 amendments to the Rules of Civil Procedure is poten-

tially a most helpful device. However, a recent, but developing, trend among the federal district courts involves exercise of pervasive and unwarranted censorship over communications between initial class action plaintiffs and other members of the class. Amici curiae consider this trend to be a serious threat to the efficacy of the class action device, and consequently to the important public interests they are endeavoring to advance. They have not sought to intervene in the instant class action or otherwise to participate with respect to its merits, but submit this Memorandum to urge this Court to grant the writ of certiorari, in order to supervise and limit this censorship development as exhibited in this case.

Amici Curiae, in their aggregate, have a far wider stake in the problem presented than have petitioners. In view of that broader interest, and because our presentation differs somewhat from that of petitioners, we believe that a separate expression of views is warranted. In addition, the accompanying memorandum discusses developments since the petition and accordingly not discussed therein, including an amendment to the district court rule challenged by the petitioners. The possible significance of this amendment is indicated by respondent's letter to the clerk dated June 28, 1971, which requested an extension of time "to

determine whether the amendment bears on the disposition of the petition."

Respectfully submitted,

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